UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

IN RE:

RETRO ENVIRONMENTAL, INC./ GREEN JOBWORKS, INC.

Case 05-RC-153468

Joint Employers, and

CONSTRUCTION AND MASTER LABORERS' LOCAL UNION 11, LIUNA,
Petitioner.

BRIEF OF PETITIONER CONSTRUCTION AND MASTER LABORERS' LOCAL UNION 11, LIUNA

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The Petitioner, Construction and Master Laborers' Local Union 11, affiliated with the Laborers' International Union of North America, (hereinafter, the "Union" or "Local 11"), files this Brief on the Review of the Decision and Order of the Regional Director for Region 5, dated June 26, 2015.

The Regional Director's decision is: 1.) Contrary to the Board's authority *March Associates Constr., Inc.*, 22-RC-075268, 2012 WL 1496208, at *1 (Apr. 27, 2012), because it places the burden of proof and persuasion to disprove an imminent cessation of work on the petitioning union; 2.) Contrary to the Board's opinion in *Fish Engineering & Construction Partners, Ltd.*, 308 NLRB 836 (1992), by finding that the employers could satisfy their burden of proof and persuasion solely through self-serving testimony.

Moreover, the RD's decision raises a substantial question of law and policy by erroneously applying the Imminent Cessation of Operations doctrine of *Davey McKee Corp.*, 308 NLRB 839 (1992), to a situation involving two active, ongoing companies that indisputably are operating within the geographic area of the petitioned-for union. The Regional Director's application of *Davey McKee* in this circumstance is inappropriate, and on its face is arbitrary and capricious. The Imminent Cessation of Operations doctrine holds that the NLRB will dismiss a petition for an election where the hearing evidence shows that the company involved will not be operating when, or soon after, the election is held. *See Davey McKee,* 308 NLRB at 840. In this case, no party took the position that either company alleged to be joint employers would cease operating. Indeed, both parties affirmed in testimony, repeatedly, that there was no reason to believe that either company would cease operating, or cease operating with each other. The owner of Retro, Robert Gurecki, directly testified he was satisfied with GJW, and had no current plans to cease using the company's services. (Tr. 48:15-49:17.) Yet the Regional Director somehow concluded

that "the uncontroverted testimony in the record demonstrates that nether Retro nor Green JobWorks anticipate any joint work in the future." D&O at 6.

As the Regional Director himself admitted, "Retro and Green JobWorks individually remain ongoing businesses, and there is no evidence to demonstrate that there has been a fundamental change in the nature of either company's operations." D&O at 6. In light of this admission, the Imminent Cessation of Operations doctrine should not have been applied. The Regional Director's decision should be reversed, and an election ordered.

STATEMENT OF THE ISSUE

Was the Regional Director correct in finding an imminent cessation of operations and no useful purpose for the petitioned-for election?

FACTS

A pre-election hearing was held on June 11, 2015. At the hearing, the following witnesses gave testimony: Robert Gurecki, the President of Retro Environmental, Inc. ("Retro"), Larry Lopez, the President of Green Jobworks, LLC ("GJW"), and Eric Brooks, an employee of the putative joint employer, Retro-GJW.

The first witness of the hearing was Robert Gurecki, the President of Retro. Gurecki testified that Retro is an employer in the building and construction industry. (Tr. 28:18-22.) Retro performs demolition and environmental remediation work, which mostly means asbestos removal. (Tr. 29:1-11.)

GJW is a temporary staffing company that supplies Retro with additional demolition and asbestos removal laborers on an as-needed basis. (Tr. 30:21-25.) GJW has provided Retro with employees for about five years. (Tr.31:1-2.) GJW has supplied workers to Retro on at least ten

projects, and probably more. (Tr. 31:3-14.) GJW has provided Retro with workers on projects other than school renovations. (Tr. 70:17-19.) The project ongoing during the hearing was at DC Scholars School and Powell Elementary. (Tr. 54:24-55:10.) GJW's only provides two classifications of workers to Retro: demolition laborers and asbestos removal laborers. (Tr. 68:12-21.)

Gurecki testified that a company needs a license to perform asbestos remediation work, and that Retro is a licensed contractor. (Tr. 29:12-24.) Gurecki also testified that supervisors of asbestos removal must be licensed, and the supervisors of Retro who supervise asbestos removal are licensed, including Jose Guerrero and Manuel Alverises, the supervisors assigned to the DC Scholars project. (Tr. 43:13-44:10.)

Gurecki testified that Retro provides all supervision for employees referred to Retro by GJW. (Tr. 67: 20.) Gurecki testified that the Retro supervisors supervise the GJW employees in a manner indistinguishable from the Retro employees. (Tr. 49:24-50:9.) Gurecki further testified that Retro provides nearly all equipment that the GJW employees require, such as sledgehammers, wire cutters, disposal filters for respirators, microtraps, and Tyvek suits. (Tr. 39:16-:41:17.) Gurecki confirmed that Retro does not charge GJW in any manner for the use of this equipment by its employees. (Tr. 41:18-42:2.) Retro supervisors also determine when GJW employees get breaks. (Tr. 69:9-13.)

Gurecki testified that Retro is satisfied with GJW, and has no current plans to cease using the company's services. (Tr. 48:15-49:17.) Gurecki's testimony on this point is worth examining in detail:

> Q. You've been working with Green JobWorks for 5 years. That's what you said?
>
> A. Yes.

Q. And do you have any reason to believe that you would terminate that relationship in the foreseeable future?

A. No.

Q. Are there any problems that you currently have experienced or recently experienced with Green JobWorks that's making you think that maybe you don't want to continue operating with them?

A. No.

Tr. 48:15-49:3.

The second witness was Lazaro "Larry" Lopez. (Tr. 74:15-19.) Lopez is the President of GJW. (Tr. 75:9-10.) GJW provides labor to Retro. (Tr. 75:19-76:4.) It also provides manpower to approximately twenty other construction contractors and subcontractors. (Tr. 76:5-8.)

Lopez testified that GJW has supplied workers to Retro on at least ten projects, and possibly twenty. (Tr. 81:14-22.) One other project on which GJW supplied labor to Retro was a lead removal project at the White House. (Tr. 80:34-81:8.) GJW has a field supervisor named Juan Rodriguez. (Tr. 84: 12-15.) Rodriguez is charged with supervising all of the projects to which GJW has supplied workers. (Tr. 87:8-11.) Rodriguez usually goes from site to site, and rarely stays at a single site for a whole day. (Tr. 87:16-17; 104:18-105:2.)

Lopez testified that Retro supervisors are responsible for directing GJW employees on a daily basis. (Tr. 90:4-8.) GJW does not provide GJW employees with equipment for removing asbestos, such as Tyvek suits, microtraps, or glove bags. (Tr. 87:18-89:9.) Lopez testified that GJW is not licensed in Maryland, DC, or Virginia to remove asbestos. (Tr. 89:17-19.)

Retro is responsible for tracking the hours of GJW employees and reporting those hours to GJW. (Tr. 93:24-94:3.) If Retro is dissatisfied with the performance of any GJW employees, Retro calls GJW, and GJW immediately contacts the employee to inform him that he or she will be removed from the project. (Tr. 95:19-96:6.) Lopez added that GJW would want to know why

Retro sought the removal. (Tr. 96:5-7.) If employees accrue a certain amount of no-call/no shows or lateness that is reported by contractors, GJW terminates employees in its database.

Lopez also testified that Retro tasked GJW with recruiting DC resident workers to satisfy hiring requirements on the DC school jobs. Retro gave GJW this task to help Retro satisfy its hiring obligations, and therefore intended to take credit from GJW's hiring. (Tr. 141148:24-150:7.) Lopez also testified he believed, based upon different jobs he had seen before, that the number of employees at Powel and DC Scholars could rise to 80 to 100 by the end of June. (Tr. 140: 23147:17-23;

The third witness was Eric Brooks. Brooks testified that he has been an employee of GJW for over a year as a general laborer. (Tr. 106:24-107:3.) As a demolition laborer, Brooks' tasks consist of knocking down walls, taking out lights, disposing of trash, and removing tiles. (Tr. 109:24-110:2.) GJW assigned Brooks to the DC Scholars School site, and at the time of the hearing Brooks had worked there for about two weeks. (Tr. 109:12-13.) On that project, Brooks received his instruction from Retro supervisors, specifically a supervisor named Jose. (Tr. 110:3-12.)

Brooks testified that Retro supervisors give him instruction with respect to how he performs his work. (Tr. 111:13-16.) For instance, at DC Scholars School, the demolition work needed to be performed quietly so as not to disrupt the classes. Retro supervisors instructed Brooks to work quietly. (Tr. 111:23-112:9.) The Retro supervisors also instructed Brooks with respect to how they wanted the lights removed. (Tr. 113:14-24.) Specifically, Brooks was instructed to remove the light bulbs first, and then use bolt cutters to remove the lights from the ceiling. (*Id.*) Brooks also testified that Retro supervisors tell him when to take breaks, and when breaks are over. (Tr. 114:17-22.)

Brooks also testified about an example of how a supervisor for a contractor directly disciplined him as an employee of GJW. Brooks understood that he was not supposed to use his cell phone while working on a project, except for in emergencies. On one occasion, he received an important call about this child, and he answered the phone. (Tr. 116:1-16.) The supervisor was not in the vicinity when Brooks received the call, but later appeared while Brooks was on the call. (Tr. 118:23-119:21.)The supervisor sent Brooks home immediately, so he did not finish working that day. (Tr.119:17-21.) Brooks then received a call the following day from GJW notifying him not to return to the project. Brooks remained unemployed for a period after that. (*Id.*)

THE REGIONAL DIRECTOR'S DECISION AND ORDER

The Regional Director dismissed the petition upon finding that an election would serve no useful purpose, and citing *Davey McKee Corp.*, 308 NLRB 839 (1992). D&O at 7. The RD based this ruling upon his finding that "uncontroverted testimony in the record demonstrates that neither Retro nor Green JobWorks anticipate any joint work in the future." D&O at 8. The testimony to which the RD referred is not cited, but the D&O also states that "there are no other ongoing or anticipated projects by the alleged joint-employer entity." D&O at 8.

The RD made his ruling notwithstanding the following uncontroverted evidence. First, "Retro and Green JobWorks remain ongoing businesses, and there is no evidence to demonstrate that there has been a fundamental change in the nature of either company's operations." *Id.* Second, the Regional Director found that in the prior five years, Retro had engaged Green JobWorks for labor on more than ten projects, and possibly more than twenty projects. D&O at 3 & n.6. The crux of the RD's decision turned on his conclusion that a decision to hold an election would "rely on wholly-unsupported speculation that Retro will have a demand for additional labor in the near-future, that it will meet that demand with employees

from Green JobWorks, and that demand for labor will be sufficient to warrant conducting an election." D&O at 6-7.

It bears observation that the RD did not make a finding of joint-employer status, but he did find "a colorable claim of a joint employer relationship." D&O at 8. Furthermore, the RD rejected arguments that the petition should be dismissed because the employees were temporary or because the petition was premature. D&O at 8-9.

ARGUMENT

I. THE REGIONAL DIRECTOR ERRED BY FINDING AN IMMINENT CESSATION IN OPERATIONS BY RETRO AND GJW SUCH THAT AN ELECTION WOULD SERVE NO USEFUL PURPOSE.

A. The RD Erred in Placing the Burden of Proof and Production on the Petitioner to Disprove an Imminent Cessation of Operations.

The RD dismissed the petition based upon the failure of the petitioner to provide evidence "to rebut the testimony that the petitioned-for unit employees would cease having employment with the alleged joint employer after mid-July." D&O at 6. This was an error, however, because it ignored the NLRB's authority that it is the *employer's* burden to show an imminent cessation of operations, and not the petitioner's obligation to disprove it.

The Board's opinion in *March Associates Constr., Inc.*, 22-RC-075268, 2012 WL 1496208, at *1 (Apr. 27, 2012), shows that the RD was incorrect to place the burden of proof and persuasion on the petitioner. In *March Associates*, the Board affirmed a direction of election where the employer attempted to predicate a "no useful purpose" defense on mere testimony of the employer's intent to "abandon its use of laborers to do future clean-up work." The Board ruled that attempting to establish an imminent cessation of operations on mere testimony was "decidedly inadequate." Thus, *March Associates* makes clear that the burden of proof and production when showing an imminent cessation of work is on the employer, not the petitioner.

Moreover, as a matter of policy, allocating the burden of proof and persuasion on the employer is sensible because it is the employer who possesses all of the evidence on its future business prospects, not the union or employees.

Identifying who bears the burden of proof is critical in this case because the RD's finding that Retro and GJW might not work together in the future rested entirely on his conclusion that Local 11 failed to rebut this possibility. The RD's finding that a cessation of operations was imminent and that a continued relationship was "speculative" is tied to his implicit placing of the burden of proof and persuasion on the union. By requiring the union to carry the burden of disproving an imminent cessation of operations, the RD erred and should be reversed.

B. The RD Erred in Finding that the Employers Met Their Duty of Production and Persuasion In Showing an Imminent Cessation of Operations.

The Board's opinion in *March Associates* also makes clear that the burden of proving an imminent cessation of work cannot be established merely by self-serving testimony from an employer. The Board ruled that basing an Imminent Cessation of Operations defense on mere testimony was "decidedly inadequate." *March Associates Constr., Inc.*, 22-RC-075268, 2012 WL 1496208, at *1 (Apr. 27, 2012).

Here, Retro and GJW failed to meet this burden because they only offered self-serving testimony, precisely the type found "decidedly inadequate" by the Board in *March Associates*. Retro and Green JobWorks did not offer any documentary evidence showing completion dates and a lack of work in the geographic areas. Nor was the employers' testimony mutually corrobative on this point. Actually, there was no evidence in the record suggesting that the companies would not work together in the future.

The only testimony the Employers provided was the unremarkable observation that the current projects where employees were working would eventually come to an end. This is not

sufficient to show an imminent cessation of operations. At a minimum, *March Associates* requires employers to offer "mutually corroborative" testimony of a cessation of work, which should be supported by documentary evidence. Here, the Employers should have been required to offer clear, documented proof that they no longer intended to work together in the future. Because that evidence was lacking here, the Regional Director erred in finding an imminent cessation of operations.

C. The Regional Director Applied the Wrong Standard By Finding an Imminent Cessation of Operations Even When the Evidence Showed Actively Operating Companies With Some Prospects for Future Work.

The Board's opinion in *Fish Engineering & Construction Partners, Ltd.*, 308 NLRB 836 (1992), makes clear that an election will serve a useful purpose so long as the company is actively operating and has some prospects for future work. To satisfy this showing, the Board ruled that it was sufficient to show that the employer had submitted bids for work, even if the work had not yet been awarded and might not be awarded to the employer. *See id.* ("Based on this undisputed evidence of the Employer's past and current work, and its bidding on future work within the unit sought by the Joint Petitioner, the Board finds that it would serve a useful purpose to conduct an immediate election after resolving the remaining unit issues.")

Here, Retro and Green JobWorks have an active ongoing relationship. Moreover, the RD even found that Retro had future work. The only issue was whether Retro would decide to request labor from Green JobWorks on those projects. This situation is exactly analogous to the situation in *Fish Engineering* where the employer had submitted bids on future work "with its current contractor." *Id.* at 836. While the RD here deemed it speculative whether Retro would use Green JobWorks in the future, the question is no more speculative than the question of whether the employer in *Fish Engineering* would win the bids for future work that it submitted. *Fish Engineering* makes clear that the prospect of future work is sufficient to preclude a finding

of an imminent cessation of operations. By failing to follow this precedent, the RD erred and should be reversed.

D. The Regional Director's Finding of a Likely Cessation of Bargaining Unit Work Was Arbitrary, Capricious, and Lacking of Substantial Support in the Record.

The RD's finding of an imminent cessation of operations by Retro and Green JobWorks was arbitrary, capricious, and lacks substantial support in the record. Neither Retro nor Green JobWorks attempted to claim that they will not work together in the future. Gurecki's testimony was emphatically to the contrary, i.e., that there was no reason that the two companies would not work together. Against the background of the parties' five-year relationship working together on at least more than ten projects and possibly on more than twenty projects, the only reasonable inference to draw was that Retro and Green JobWorks likely would *continue* working together. This is not speculation. This is a reasonable inference supported by the evidence and the testimony of Gurecki himself.

Against this evidence of a long-term relationship that will continue, the Employer offered *no evidence* that they would not work together in the future. They merely provided testimony that the current Retro projects where GJW employees were working would conclude in the near future. But this is always the case in construction; all construction projects end, and most end over a relatively short period of time. In sum, there is no evidence in the record to support the conclusion that Retro and GJW will cease operations together in the future. The Regional Director's finding that it was more likely than not that Retro and Green JobWorks would not work together in the future is arbitrary, capricious, and lacks substantial support in the record.

E. The Imminent Cessation of Operations Doctrine Has Never Previously Been Applied To Ongoing Businesses That Will Remain Active Within the Geographic Area of the Unit.

The NLRB has not previously applied the Imminent Cessation of Operations doctrine to a case like this, which involves active, ongoing businesses who have not undergone any fundamental change in how they operate.

For instance, in *Davey McKee Corp.*, 308 NLRB 839 (1992), the employer was finishing up its current projects imminently and had no active bids submitted for future project. In *M. B. Kahn Const. Co., Inc.*, 210 NLRB 1050 (1974), "the Employer d[id] not have any work, other than this project, in the area, and … d[id] not contemplate any in the future." In *General Motors Corp.*, 88 NLRB 119, 1-120 (1950), the petitioner sought an election for employees of General Motors who were hired to fix buses operated by the New York City Department of Transportation where both parties agreed that "the employment of the mechanics would be at an end when the project was completed" because it was a special and temporary project for GM.

The thread that unites these Board decisions is that the companies either were likely to cease operating altogether or they were from out-of-town and had no plans to continue operations in the geographic area. The instant case, by contrast, involves two active, ongoing businesses who have a long-term relationship and will continue to operate in the area. The Board never before has applied the "no-useful-purpose" doctrine in a situation like this. The RD, therefore, erred in applying this doctrine to the present circumstances.

F. If the Regional Director's Decision Is Affirmed, *Davey McKee* will be Applicable with Respect to All Temporary Staffing Agencies.

The most troubling aspect of the RD's decision is that the circumstances present in this case are present in all situations where a construction contractor utilizes labor from a staffing agency. Far from an imminent cessation of operations, the instant case presented a long-term,

robust relationship between a contractor and staffing company. If the instant case can be analogized to an imminent cessation of operations scenario, then all cases involving a construction contractor and a temporary staffing company may be. Moreover, because the RD found a colorable claim of a joint employer relationship, this case is governed by *Greenhoot, Inc.* 205 NLRB 250, 251 (1973) and *Oakwod Care Center*, 343 NLRB 659 (2004), which holds that the only appropriate unit for organizing is the unit that Local 11 petitioned for.

The result of the RD's decision, therefore, will be to make virtually impossible representation elections involving leased employees in the construction industry. In all such cases, the current projects will be of short duration, and the prospect of future projects will be subject to the whim of the construction contractor. If the RD's decision is upheld, in all such situations, the future employment of the petitioned-for unit employees of the staffing company will be too speculative to hold an election. Such a policy is contrary to the purposes of the Act, which charges this Board with broadly protecting the § 7 rights of employees within its jurisdiction. Accordingly, the RD's decision is contrary to the policy of the Act and should be reversed.

CONCLUSION

Based upon the foregoing, the Regional Director's decision dismissing the petition should be reversed, and the Board should direct an election sought by Local 11 forthwith.

November 19, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing BRIEF OF PETITIONER was served on the parties identified below by Electronic Mail:

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